

EVE M. HOLTON,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

**RULING
ON
LACK OF
PROSECUTION**

Case No. 00-0075-PC-ER

This complaint arises from respondent's actions of placing complainant "on a concentrated planning performance and development process" on October 21, 1999, and of discharging complainant on April 7, 2000. Complainant alleges retaliation for having engaged in Fair Employment activities and whistleblower retaliation. The matter is currently before the Commission as a consequence of a 20-day certified letter sent to the complainant on August 22, 2000. The parties have had an opportunity to file written arguments and the following findings are based on materials in the case file and are made solely for the purpose of ruling on whether the complainant has fulfilled her responsibility to pursue her claims.

FINDINGS OF FACT

1. This complaint was filed on June 5, 2000.
2. At all times relevant to this proceeding, the complainant has been represented by counsel.
3. By letter dated June 26, 2000, a representative of the Commission asked complainant to provide certain additional information relating to her whistleblower claim by July 10, 2000. Complainant responded by letter dated July 5, 2000, and received by the Commission on July 10th
4. Respondent filed its answer to the complaint on July 20, 2000. The due date for the answer was July 24, 2000.

5. By letter dated July 20, 2000, the investigator directed the complainant to respond to the answer by August 15th.

After you review the respondent's answer, you may decide that you no longer wish to pursue the complaint, you may decide that you have no further information to add, or you may decide to rebut respondent's answer. No matter what you decide, you must inform the Commission of your decision in writing no later than **August 15, 2000**. The Commission will provide respondent with a copy of your response.

*If you decide to rebut respondent's answer, you must respond to the following so that the Commission receives your response no later than **August 15, 2000**.*

1. If you disagree with any of the information provided by the respondent, identify the area of disagreement, state why you disagree, and state your position as it relates to each area of disagreement. In your rebuttal please refer to page and paragraph (of the respondent answer) when stating your disagreement and listing your rebuttal information.
2. Provide any additional information you feel will support your allegations or refute the respondent's statement. The initial investigation relies on information developed by the parties, and most likely, no investigative interviews will be conducted.

Failure to respond to a request for information from the Personnel Commission may result in the imposition of the sanctions set forth in §PC 2.05(4)(b), Wis. Adm. Code:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

If you have any questions, please contact me. (Emphasis in original.)

6. Complainant did not respond to the July 20th letter, so on August 22nd, the investigator sent complainant a certified letter, stating in part:

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence. Your response

must be received by the Commission within 20 calendar days of the date of this certified letter. If you do not file your response with the Commission within the 20 day time period, I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

As requested, this complaint was also filed with the Equal Employment Opportunity Commission (EEOC). To protect your rights with that agency, you must comply with their enclosed letter. Please note that pursuant to EEOC regulations, you have 30 days in which to respond to the EEOC, as opposed to the 20 day period for responding to the Personnel Commission as set forth above. (Emphasis in original.)

7 Complainant's response to the 20-day letter was due no later than Monday, September 11, 2000.

8. Complainant did not file a written response by September 11th

9. Complainant's representative contacted the Commission's investigator by telephone on September 12, 2000, at approximately 4:30 p.m. The investigator described the first call in a notation in the case file as follows:

Told him he should get in his answer as requested. He wanted to not have this case dismissed & wanted to know if I thought it would be. Told him statute lang. was clear & Commission would have to look at the circumstances before deciding on dismissal or not -- he said he'd fax info in on 9/13 but his response was going to be that he had nothing new to add to the case (in response to my cert. letter of 8/22 & letter of 7/20)

10. On September 13th, complainant filed, by fax, a letter stating she had "no further information to add at this point."

11. Complainant has subsequently substituted counsel of record.

OPINION

Questions relating to whether a claimant is adequately prosecuting his/her complaint of discrimination during the investigative process are often resolved by relying simply on §111.39(3), Stats. That subsection reads:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

The 20 day period for responding to a certified letter from the Commission under §111.39(3), Stats., commences on the date of the Commission's letter rather than the day complainant received the certified letter. *Sloan v. DOC*, 98-0107-PC-ER, etc., 2/10/99. Here, the letter specified that the response period began on the date of the letter, or August 22nd. Complainant's response was due by September 11th.

Complainant has offered the following arguments regarding the question of the timeliness of her response to the August 22nd letter:

By way of this letter, I am requesting the State Personnel Commission decide **not** to dismiss this complaint. As your September 13th letter suggests, Eve Holton's response to the Respondent's answer was not received within 20 days from the August 22nd letter. However, we inadvertently began the tolling period from the date we received the letter, August 24th, 2000. Accordingly, I am enclosing a copy of the August 22nd letter. In the spirit of judicial and administrative economy, I beg the Commission to continue its investigative functions. To date, Eve Holton has filed 2 complaints with the State Personnel Commission. She has also provided the Commission with documentation in support of her claims. Also, she has cross-filed with the EEOC in order to protect her right to pursue certain Federal causes of action. If the complaint were dismissed, Ms. Holton would be forced to re-file her complaint with the State Personnel Commission. It is in the best interests of both the Complainant and the Respondent for the Commission to continue its investigation of the pending complaints.

There was no communication, whatsoever, from complainant to the Commission within the 20 day statutory period. The Commission has consistently dismissed claims for failure to comply with §111.39(3), Stats., where the responses were received just one or two days late. *Billingsley v. DOR*, 87-0132-PC-ER, 7/13/88; *King v. DHSS [DOC]*,

88-0007-PC-ER, 5/29/91, *Powell v. DHFS*, 97-0147-PC-ER, 1/14/98; *Vest v. UW(Green Bay)*, 97-0042-PC-ER, 3/20/98.

While the Commission finds that the complainant failed to meet the statutory requirement of §111.39(3), Stats., that conclusion does not apply to the question of whether complainant's remaining claim under the separate whistleblower law subchapter should also be dismissed. In analyzing the complainant's conduct in terms of his whistleblower claim, the Commission looks to the administrative rules it has issued to regulate the investigative process. The June 2nd letter to complainant referenced §PC 2.05(4)(b), Wis. Adm. Code, which provides:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

Here, complainant was directed, in letters dated July 20th and August 22nd, to file a response to the written answer supplied by the respondent. Complainant filed her response on September 13th indicating she had nothing substantive to add to her previous materials. The complainant has indicated she wishes to pursue her whistleblower claim, she has responded to the answer and there is no language comparable to §111.39(3), Stats., that applies. Therefore the Commission will continue to process complainant's claim under the whistleblower law.

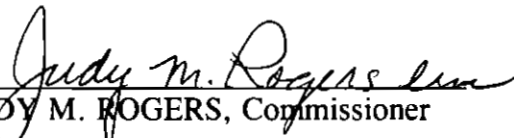
ORDER

Complainant's claim under the Fair Employment Act is dismissed for failure to comply with §111.39(3), Stats. The Commission will continue to process her whistleblower claim.

Dated: November 3, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner